

**IN THE SUPREME COURT OF MISSOURI**

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SC 086712

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STATE OF MISSOURI *ex rel.* AMOCO OIL COMPANY,  
now known as BP PRODUCTS NORTH AMERICA INC.,

Relator,

vs.

THE HONORABLE JOHN J. RILEY,  
Circuit Judge, 22<sup>nd</sup> Judicial Circuit, Missouri,

Respondent.

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ON PRELIMINARY WRIT OF PROHIBITION  
FROM THE SUPREME COURT OF MISSOURI  
TO THE HONORABLE JOHN J. RILEY, CIRCUIT JUDGE  
TWENTY-SECOND JUDICIAL CIRCUIT, MISSOURI  
REGARDING CAUSE NO. 002-8365

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**RELATOR'S REPLY BRIEF**

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David M. Harris, MBE# 32330  
Dawn M. Johnson, MBE# 41991  
Jordan B. Cherrick, MBE# 30995  
Julia M. Sinn, MBE# 55091  
Greensfelder, Hemker & Gale, P.C.  
10 S. Broadway, Suite 2000  
St. Louis, MO 63102  
(314) 241-9090; Fax (314) 345-5465

Attorneys for Relator

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## **INTRODUCTION**

BP has produced millions of pages of potentially relevant documents, including half a million e-mails, to Plaintiffs. The only issue before this Court is whether the trial court's Orders to produce hundreds of thousands of pages of irrelevant documents without affording BP its right to protect privileged and private information were improper. They were. The trial court erred by ordering BP to produce 200,000 e-mails that did not hit on a search term and that thus had been properly set aside early on as irrelevant and not requiring review for privilege or privacy interests.

Plaintiffs concede that search terms are a proper method for determining relevance. They now raise for the first time that they would have preferred to add terms to BP's list of search terms applied in the production review. Plaintiffs, however, twice admitted to the trial court that in fact BP had given them the opportunity to add search terms to the list.

Plaintiffs further concede that a court cannot properly force a party to produce privileged documents. Rather, they incorrectly contend that the trial judge in this case did not compel the production of privileged documents. BP was ordered to produce 200,000 e-mails in fifteen days that it had not reviewed based on the search term methodology. It is not feasible for a party to adequately review 200,000 e-mails for relevance, privilege and privacy concerns in such a short amount of time. Recognizing that, the trial court attempted to ameliorate the effect of its Order by offering that BP would not waive its right to object at trial that a document produced in haste was privileged. As demonstrated in the previous pleadings, there is no principled basis to



support the trial court's untenable position. The attorney-client privilege is not solely an evidentiary issue at trial such that one may be compelled to produce privileged documents in discovery.

Plaintiffs attempt to justify the trial court's actions by characterizing the Orders as "sanctions" against BP that are thus immune from procedural safeguards. In creatively characterizing the underlying Orders as "sanctions" Orders, Plaintiffs then take this Court on a lengthy journey through numerous earlier discovery disputes that are irrelevant to the legal issues at hand. The Orders were not sanctioning BP. Even if they were, an Order requiring the production of irrelevant, privileged and/or confidential materials is nonetheless an improper Order.

## **ARGUMENT**

### **I. PLAINTIFFS' DEPICTION OF THE DISCOVERY HISTORY IN THIS CASE IS WRONG.**

The following corrections are included for the record and for clarification of critical points necessary for the determination of this action.

#### **A. Corrections regarding the trial court's actual findings.**

The following statements in Plaintiffs' Brief are unsupported by the record:

- Page 16 – *"At this point, the court was completely frustrated with BP's total failure to follow its own agreement - much less the courts' orders and BP's discovery obligations."* Not true. At no time did the trial court state or imply in any of its Orders or otherwise that it was "frustrated" by BP's

production or that BP “totally failed” to follow the Stipulation Regarding Production of Electronic Documents. (A704-706).

- Page 17 – “*The trial court reasonably did not trust BP to act in good faith in performing a new electronic search and undoubtedly expected that if it ordered one, BP would engage in the same obstruction, delay, bad faith, and violation of court orders that it had done in the past.*” Not true. The trial court never made a single statement about BP’s search terms, its search methods, or BP’s motives in its production of documents. (A704-706).
- Page 32 – “*Judge Riley did not allow BP to rely on some alleged unwritten agreement based on a frivolous argument about an ex parte contact with Judge Neill to avoid BP’s obligation to produce documents.*” Not true. The trial court did not find that BP’s objections to Judge Neill’s Order were frivolous or that BP had objected to her Order to avoid its obligation to produce documents. Rather, Judge Riley’s Order states, “Defendant’s Motion to Vacate Order of October 7, 2002 is hereby denied.” (A512).
- Page 42 – “*In short, nothing in the record indicates that BP gave Plaintiffs the opportunity to add terms to its search. Indeed, the record is clear that BP did not provide any such opportunity, and the trial court reasonably reached this factual conclusion.*” Not true. The trial court reached no such conclusion and made no such finding. (A704-706, A1219-1221). To the contrary, the record shows that Plaintiffs repeatedly informed the trial court

that BP did give Plaintiffs the opportunity to add search terms. (A1046, A1122).

- Page 65 – *“The court further found that BP’s repeated delays and refusals to cooperate suggested that the only way of ensuring that responsive e-mails were produced would be to require production of the full 200,260 non-privileged e-mails.”* Not true. The trial court never made any such “finding.” (A704-706, A1219-1221).

**B. BP complied with the trial court’s Orders and its own Stipulation regarding the production of e-mails.**

BP complied with every single discovery obligation to produce e-mails. In March 2004, BP challenged the October 7, 2002 Order as an ex parte order. (A325-344). The two years between the October 7, 2002 Order and BP’s challenge cannot be characterized as evidence that BP violated the October 7, 2002 Order. Rather, BP had been in regular communication with Plaintiffs, attempting to resolve the issue of whether the Order was an invalid ex parte order. (A290, A435, A452). In addition, the parties voluntarily stayed discovery for nearly one year to attempt to reach a settlement in the case. (A447). When it was clear that settlement could not be reached and that Plaintiffs would no longer attempt to negotiate the scope of discovery, BP challenged the Order in court. (A324-344). Until the court ruled on whether the Order was valid, BP had no obligation to produce the e-mails. By this same time, BP had already produced hundreds of thousands of other documents in both paper and electronic form – a critical contextual fact omitted in Plaintiffs’ papers.

On July 20, 2004, the trial court upheld the October 7, 2002 Order. (A512). BP did not produce e-mails within the 30 days ordered in the July 20, 2004 Order because the parties had agreed to enter into a Stipulation regarding the e-mail production. The parties signed the Stipulation Regarding the Production of Electronic Discovery (the “Stipulation”) on August 24, 2004. (A562-563). In this Stipulation, BP agreed to produce approximately 300,000 e-mails and a privilege log. (A562-563).

The text of the Stipulation does not address the precise production date or the procedure for production of documents. On August 31, 2004, BP produced six CDs of e-mails to Plaintiffs. (A810). BP informed Plaintiffs of its decision to attempt “to remove what we consider attorney-client privileged e-mail from this production.” (Id.) BP also advised Plaintiffs that it would review those e-mails and that “if any of them are deemed responsive, non-privileged communications, we will produce them as we review them” in a rolling production. (Id.) Within one month, Plaintiffs received the remaining e-mails and a privilege log. (A812). Plaintiffs concede that by this time, they had received 300,212 e-mails. (Respondent’s Brief, p. 16).

**C. BP advised Plaintiffs’ counsel that it was removing e-mails by subject line.**

Plaintiffs argue that BP claims it forgot to tell Plaintiffs and the trial court that it removed some e-mails based on their subject line. (Respondent’s Brief, p. 84). This is untrue. BP told Plaintiffs about the removal in August 2004 while Plaintiffs’ counsel was at BP’s counsel’s office reviewing a production of paper documents. This conversation is

supported by a letter from BP's counsel to Plaintiffs' counsel referencing removal of documents based on their subject line. (A802).

BP is uncertain whether the issue of subject line removal was before the trial court before the filing of Wes Hagen's affidavit attached to BP's Motion for Reconsideration. (A711, n.6; A760, ¶9). BP may not have raised the methodology at the hearings because BP had already informed Plaintiffs' counsel that it had removed some e-mails by their subject line. Plaintiffs voiced no objection. BP, therefore, reasonably assumed the issue was resolved.

**D. BP can search the additional 200,000 e-mails using new search terms without incurring fees of \$62,000.00.**

Plaintiffs challenge BP's search method by arguing that BP states that it cannot run any new searches of the 200,000 e-mails in question. (Respondent's Brief, pp. 40-41, 43). Plaintiffs misstate BP's position. BP can add new search terms and will incur a fee for those items that "hit" on the search term. If Plaintiffs had requested that BP add reasonable search terms, BP could have complied. Plaintiffs, however, have always maintained that no search using search terms was reasonable and that BP was obligated to review every single e-mail by hand. (A1121-1122). Thus, BP would incur a fee for every single e-mail to be migrated into its review database, not just those e-mails that hit on a search term. It is this type of exhaustive, individual review of 200,000 documents that will cost BP \$62,000.00, plus attorneys' fees.

**E. BP has never caused the trial court to continue trial dates.**

Plaintiffs erroneously state that BP caused this case not to progress to trial. (Respondent's Brief, p.65). Two Orders in the record reflect the trial date being delayed. One granted Plaintiffs' request to remove the case from the April 2003 trial docket. (A205). The other Order removed the case from the date of its trial setting because the trial judge was unavailable at the scheduled time. (A1146). The current trial date in October 2006 was mutually agreed upon, and BP does not foresee any further continuance for a reason within BP's control.

**F. BP began retaining relevant e-mails as soon as the lawsuit was filed.**

While BP's preservation of e-mails is not at issue, Plaintiffs nonetheless falsely assert that BP did not begin preserving e-mails until one and a half years after Plaintiffs filed their Petition. (Respondent's Brief, p. 67). BP did not download e-mails until 2002. (Relator's Brief, p. 29). BP employees, however, had been retaining their e-mails in their mailboxes since December 2000, when BP's counsel instituted its document preservation procedures by notifying the key employees involved with the St. Louis market. BP produced its preservation letter to Plaintiffs and Plaintiffs have received hundreds of thousands of e-mails, approximately half of which were created between January 1995 and April 2002.

**G. BP did not improperly redact documents.**

Plaintiffs erroneously claim that BP redacted relevant information from a document. (Respondent's Brief, pp. 47-48). This is not true. The documents Plaintiffs reference were documents that were originally produced in two other cases against BP in

Atlanta, Georgia. (Respondent's A4-6, A19-21). The bates labels are "AM" on A4-6 and "BP Ward" on A16. For this case, BP is using the bates label "AOC/Turpin." BP produced the Atlanta documents in this case and allowed Plaintiffs to remove any redaction tape. (A715, n.7).

**H. BP has always been truthful with the trial court.**

Plaintiffs falsely claim that BP has frequently lied to the trial court. (Respondent's Brief, p. 65). Plaintiffs do not cite to any specific instance to support such a disrespectful and outrageous assertion. BP has never lied or intentionally provided misinformation to the trial court. The only instance in which BP's information was inaccurate was its estimate of the number of e-mails that hit on a search term. As BP explained, however, the 310,994 number was an estimate. (A760, ¶8). When BP's computer consultant verified the numbers, he determined that the estimated number was wrong and there were actually only 306,947 items that hit on a search term. (Id.) BP provided information to the court that it believed to be accurate when it was provided. When BP learned the estimate was inaccurate, it informed the court of the correct number. (Id.)

Plaintiffs ignore the fact that it is very difficult to obtain an accurate count of e-mails in an electronic production because there are many different methods one can use to count the number of items in a review. (A762-763, ¶¶ 21-22). In addition, there are often duplicates that may be counted as a separate item when an estimate is done, but are not truly different or distinct documents. Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2004 WL 1895122 (N.D. Ill. August 10, 2004) (noting that "discussing [electronic] documents in terms of numbers is somewhat inexact.").

## **II. STANDARD OF REVIEW.**

Plaintiffs erroneously state the proper standard of review based on the false assumption that the trial court's October 12, 2004 Order was a sanctions order. BP has not been sanctioned. In fact, the hearing on Plaintiffs' motions for sanctions occurred on November 17, 2004 – more than a month after the Order in question was issued. Even assuming the trial court did issue a sanction, the trial court clearly abused its discretion because BP complied with its promise in its Stipulation to produce approximately 300,000 e-mails. Moreover, the trial court's Order misapplies this Court's discovery rules and Missouri's privilege law.

## **III. BP HAS NOT BEEN SANCTIONED.**

### **A. Plaintiffs' motions for sanctions are still pending.**

Plaintiffs' September 7, 2004 Motion for Sanctions was never taken under submission before the October 12, 2004 Order. Thus, the trial court erred when it stated that Plaintiffs' Motion for Sanctions was before the court. (A704). On October 5, 2004, the parties appeared before the trial court on Plaintiffs' various motions. (A512, A564, A634). At that hearing, the trial court resolved various discovery issues, but it never ruled on Plaintiffs' motions for sanctions. (A703). Rather, the October 5, 2004 Order explicitly states, "All of Plaintiffs' Motions For Sanctions are continued to be set." (Id.) Indeed, Plaintiffs knew that their motions for sanctions had not been decided in the trial court's October 12, 2004 Order, so they filed a "Memorandum in Further Support of Their Motions for Sanctions" with the trial court on November 10, 2004. (A1004).



The trial court did not actually consider any of Plaintiffs' motions for sanctions until November 17, 2004, when the parties appeared before the court for a hearing on Plaintiffs' motions for sanctions and other matters. (Reply A1, Reply A2).<sup>1</sup> The trial court allowed the parties to continue briefing the issue of sanctions before taking it under submission, and the court has not yet ruled upon Plaintiffs' sanctions motions. (Reply A1; A1147; Respondent's A41).

**B. BP cannot be sanctioned because it complied with its obligation to produce approximately 300,000 e-mails.**

Before a party can be sanctioned, it must fail to comply with its discovery obligations. State ex rel. Ramblin' International, Inv. v. Peters, 711 S.W.2d 597, 602 (Mo. Ct. App. 1986). BP has not failed to comply with its obligations. Rather, the trial court continued all motions for sanctions involving BP's e-mail production to allow BP the opportunity to produce approximately 300,000 e-mails.<sup>2</sup> (A512, A564, A634, A703). Before the October 5, 2004 hearing, BP had complied with its Stipulation to produce approximately 300,000 e-mails. (A810 and A812). Even Plaintiffs admit that "BP had

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<sup>1</sup> BP has added two additional documents as Exhibits 1 and 2 to the end of this brief, which are labeled as "Reply A1" and "Reply A2."

<sup>2</sup> Plaintiffs also sought sanctions for BP's alleged failure to produce certain other documents. BP contends that it has produced the relevant documents; however, these arguments are irrelevant to this action because the October 12, 2004 Order only concerned BP's production of e-mails.

produced 300,219 e-mails” by September 29, 2004. (Response, p. 16). Because BP had complied with the court’s directive to produce the e-mails, no factual foundation exists for any sanctions.

In its February 25, 2005 Order, the trial court states that BP “did not fully and timely” comply with the Stipulation. (A1220). This Order and the October 12, 2004 Order, however, completely ignore the undisputed fact that BP made an additional production on September 29, 2004. Thus, any holding that is based upon the “fact” that BP only produced approximately 116,000 e-mails (A705) constitutes an abuse of discretion because it ignores undisputed facts. State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602, 607 (Mo. banc 2002) (holding that a trial court abuses its discretion “if its order is clearly against the logic of the circumstances, arbitrary and unreasonable, and indicates a lack of careful consideration.”). Moreover, the Orders do not contain any finding that Plaintiffs have been prejudiced. State ex rel. Missouri Highway and Transportation Commission v. Pully, 737 S.W.2d 241, 245 (Mo. Ct. App. 1987) (holding that before sanctioning a party, a court must find that the opposing party has been prejudiced.).

**C. The trial court may not sanction a party by ordering the production of privileged documents.**

A judge does not have unfettered discretion to sanction a party. Rather, a judge’s discretion “is tempered in that sanctions should be limited to what is required to accomplish the purposes of discovery.” Dorsch v. Family Medicine, Inc., 159 S.W.3d 424, 439 (Mo. Ct. App. 2005). Requiring production of the additional 200,000 e-mails

does not “accomplish the purposes of discovery,” but instead ignores the purposes of discovery, which are to only allow production of relevant and non-privileged documents. See Mo. Sup. Ct. R. 56.01(b).

Plaintiffs argue that a court may order the production of privileged documents as a sanction based on In re: Ford Motor Company, 345 F.3d 1315 (11th Cir. 2003). There, the court only stated that a party may, in some circumstances, be granted “some kind of direct access” to a database if there have been discovery violations. Id. at 1317. Plaintiffs, however, omit the Eleventh Circuit’s statement that, “the district court must protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.” Id. (citation omitted). Thus, even if a party is allowed direct access to an opposing party’s documents, the court must afford some protection for information that is protected by the attorney-client privilege.

#### **IV. THE TRIAL COURT ERRED IN ORDERING PRODUCTION OF THE 200,000 E-MAILS BECAUSE BP’S SEARCH METHODOLOGY WAS REASONABLE.**

BP has produced 225,717 pages of bates-labeled paper documents; 246,767 bates-labeled pages of electronic information on CDs; 20,786 pages of documents in both paper and CD format; approximately 35 boxes of dealer files; approximately 35 boxes of financial documents; approximately 200 boxes of invoices and bills of lading at its Wood River terminal; approximately 150 boxes of BP’s tax returns for the past ten years; 83 boxes of documents produced in litigation in Atlanta; and approximately 500,000 e-mails (the 300,000 that hit on a search term and more than 200,000 older e-mails that hit on a

search term that were produced after the original production) in response to Plaintiffs' discovery requests.

Despite BP's diligent and reasonable efforts to comply with Plaintiffs' discovery requests for a 15-year time period, the discovery process is not perfect. Relevant documents may be missed, whether reviewed by hand by competent attorneys or reviewed by a computer. The trial court's decision to order the unlimited production of all available documents, however, violates the controlling law and can never result in perfection. Perfection is not the standard – reasonableness is the standard.

A Missouri federal district court noted, “the issue is not whether any further documents might conceivably exist but whether the [producing party's] search for responsive documents was adequate.” May v. IRS, 85 F. Supp. 2d 939, 945 (W.D. Mo. 1999). Even Plaintiffs concede that if an electronic search is reasonable, some responsive documents may still escape production. (Respondent's Brief, p. 80). BP's search was a reasonable effort to locate relevant documents. This Court, therefore, should make its writ absolute.

**A. A responding party may conduct searches for relevant, responsive documents based on its own interpretation of what is responsive without first consulting the requesting party.**

Contrary to MATA's contentions, BP is not seeking radical changes to the discovery rules in Missouri. (MATA Brief, p. 9). Rather, BP is asking this Court to provide guidance to the bench and bar and hold that the normal procedures for paper discovery should also apply to electronic discovery. In a paper document production, the

requesting party propounds its discovery requests, the producing party determines which documents are relevant and not privileged and then produces them to the opposing party consistent with this Court's rules of discovery. See Sup. Ct. R. 58.

Plaintiffs argue that although a responding party can be trusted to review its paper documents for relevance, it cannot be trusted to review its electronic documents for relevance. (Respondent's Brief, p. 80). Thus, they insist that the requesting party and the court must participate in creating search terms to ensure that the responding party has met its discovery obligations. (Id.) Plaintiffs' suggested protocol, however, is inconsistent with the procedures followed in a normal paper review. In a large paper review, the parties do not meet and discuss how the reviewing attorneys should conduct their review. The court does not investigate how the attorneys will find the responsive documents before they are allowed to proceed with their review. The Rules should not be changed simply because a computer is doing a search based on terms chosen by an attorney. The responding party is in the best position to determine the methodology it will use to produce its electronic documents. See, e.g. In re John Doe Proceeding, 680 N.W.2d 792, 807 (Wis. 2004); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("Zubulake III"); The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Discovery Production, Principle 6 (Exhibit 42 at A1388). Thus, the responding party should be allowed to determine which search terms it will use to retrieve relevant and responsive documents.

BP has not found, and Plaintiffs have not cited, any cases that directly address the manner in which a party should conduct its initial search for relevant electronic

documents and whether the opposing party should be a part of this process. While cases that the parties have cited are not precisely on point, they do provide some guidance to this Court. In many of the cases, the court has suggested that the responding party may conduct searches on its own to produce relevant e-mails. See, e.g., Zubulake v. UBS Warburg LLC, 217 F.R.D. at 315 (“UBS personnel could easily run a search for e-mails containing [plaintiff’s name.]”) (“Zubulake I”); Wiginton, 2003 WL 22439865 at \*6 (the responding party’s “IT department can conduct searches for e-mails containing particular key ‘sexual’ words when requested to do so by the human resources department.”). In addition, in Zubulake V, the court states that, “the parties could negotiate a list of search terms.” Zubulake v. UBS Warburg LLC, No. 02 Civ. 1243 (SAS), 2004 U.S. Dist. LEXIS 13574 at \*35 (S.D.N.Y. July 20, 2004) (“Zubulake V”). The Zubulake V court, however, does not impose a duty on the parties to confer about the specifics of how the producing party will conduct its initial search for responsive documents.

BP is not aware of any case law imposing such a duty. Plaintiffs, citing a law review article, state “a party must ‘examin[e] each document’ unless the ‘parties...stipulate[] or the court...order[s] that performing a keyword search... is desirable and sufficient.’” (Respondent’s brief, p. 71). Plaintiffs do not provide the full quote from this article, which states:

Also, the parties and court might consider other ways to minimize the roles (and costs) of attorneys in the privilege review process. For example, parties might stipulate, or the court might order, that “performing a key word search for a

privilege review rather than examining each document” is desirable and sufficient.

David K. Isom, Electronic Discovery Primer for Judges, 2005 Fed. Cts. L. Rev. 1, p. 12 at II.J.7 (February 2005) (citing Wiginton v. CB Richard Ellis, Inc., No. 02-6832, 2004 WL 1895122, at \*8 (N.D. Ill. Aug. 9, 2004)).

Although the parties could negotiate a search term list, or could enlist the help of the court, there is no affirmative duty to do so. (BP’s Opening Brief, pp. 66-79). The responding party, therefore, should be allowed to determine how it will search its documents for relevant, non-privileged documents.

**B. Even if the requesting party must be given an opportunity to comment on the search procedures, Plaintiffs did not suggest that any new terms be added to BP’s search.**

Plaintiffs’ position in the trial and appellate courts has been that an electronic search is not adequate and that BP must review every document by hand for relevance. (A1121-1123; A1568-1571). Plaintiffs, however, now concede that using search terms is an acceptable method of determining relevance if the opposing party participates in the creation of these terms. (Respondent’s Brief, 71-81). Plaintiffs thus acknowledge that if they had had the opportunity to add search terms to BP’s search, BP’s methodology would have been acceptable to them, because “at least [they] had a role in [their] own fate.” (Id. at 80).

In this case, Plaintiffs have sealed their own fate. As they twice admitted, “BP asked Plaintiffs to add to the terms.” (A1046; A1122). Plaintiffs declined to do so

because they “are not familiar with the slang, jargon, acronyms, and abbreviations that BP uses on a regular basis” and instead argued that BP could not use search terms at all. (Id.). Recognizing that their position that search terms cannot be used at all is unreasonable and unsupported by the case law, Plaintiffs changed their argument in this Court. They now argue that they did not have the opportunity to add to BP’s list of search terms. (Respondent’s Brief at 41-42).

Plaintiffs reach this erroneous interpretation of the facts by stating that when BP gave them the lists of search terms, subject lines and frequency of “hits” in August 2004, it was only for the purpose of narrowing the search, and Plaintiffs did not have the right to suggest additional search terms. (Id.). In the letter BP sent to Plaintiffs, BP was hoping to make its review less burdensome and therefore asked Plaintiffs if they could remove search terms from the e-mail review. (A802). In another letter, however, BP stated that it “was open to other suggestions as well” as to how the search could be narrowed. (A806). BP was still referring to how the search could be made more manageable, but BP’s correspondence gave Plaintiffs all of the information they needed to determine whether the terms were satisfactory to them. Plaintiffs themselves conceded that this review had given them the opportunity to “add to the terms,” as they admitted in two separate pleadings before the trial court. (A1122, A1046). Thus, the record demonstrates that Plaintiffs understood that they had the ability to suggest new search terms.



**C. BP's removal of approximately 5,800 e-mails based on their subject line was a reasonable method of eliminating e-mails.**

BP's removal of e-mails based on their subject line was reasonable and appropriate. Plaintiffs argue that there is no case law supporting this methodology and that, therefore, it should not be allowed. (Respondent's Brief, p.84). There is also no case law prohibiting this practice. The e-mails that BP removed either were clearly spam (see, e.g., A787 – “Better than Botox – Free Trial”) or indicated that the e-mail concerned another geographic area (Id. - “Clean Fuels for Chicago”) or a subject matter that was irrelevant (Id.- “Cardinal Baseball Tickets”).

**D. The trial court's Orders cannot be upheld because they do not comply with the Missouri Rules of Civil Procedure and any alleged inadequacies in BP's search may be remedied through additional discovery requests.**

The trial court's Orders should not be enforced because they compel the production of irrelevant and privileged documents. Discovery in this case, however, is still ongoing. If Plaintiffs propound new discovery requests for e-mails that are reasonable and consistent with the Rules of discovery, BP will respond appropriately to Plaintiffs' requests. Thus, BP is prepared to investigate Plaintiffs' claims that a Plaintiff's name was misspelled, that certain identifying numbers were omitted from the

list and that one Plaintiff was omitted altogether.<sup>3</sup> BP's inadvertent misspelling of a Plaintiff's name, however, does not justify unlimited production that ignores Missouri Supreme Court Rule 56.01 that only relevant and non-privileged information must be produced.

**V. THE TRIAL COURT'S ORDERS REQUIRE BP TO PRODUCE INFORMATION THAT IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.**

Respondent's Brief does not address the hornbook law raised by BP about a court's inability to order a party to produce documents without first conducting a privilege review. Plaintiffs avoid this issue by arguing that "the trial court allowed BP to review its documents for attorney-client privilege." (Respondent's Brief, p. 111). Thus, Plaintiffs concede that a court cannot order a party to produce documents without first allowing a privilege review. This concession is not surprising, as every court that has addressed the issue has given the producing party an adequate opportunity to review the documents for privilege. (Respondent's Opening Brief at pp. 83-93). See also Galvin v. Gillette Co., Nos. 051453BLS, 051543BLS, 2005 WL 1476895 (May 19, 2005 Mass.

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<sup>3</sup> Plaintiffs did not give BP this opportunity in the trial court. They did not inform BP of a misspelled name or that a Plaintiff had been omitted from the search until after BP filed its Motion for Reconsideration. (A1046; A1114, n.5). The first time Plaintiffs argued that certain identifying numbers were omitted from the search was in Respondent's Brief before this Court.

Super. Ct.) (refusing to allow practically unlimited access to a producing party's e-mails and computers because "some – perhaps many – of the electronic materials may include information that is subject to the attorney/client privilege or may contain confidential or trade secret information, all of which would first have to be retrieved and then examined before being turned over to anyone.").

Plaintiffs argue that BP's interpretation of the February 25, 2005 Order is inaccurate because BP focuses on the trial court's directive that BP should simply copy the e-mails onto CD ROM discs rather than focusing on the trial court's "wherefore" clause in the Order. (Id. 112). The "wherefore" clause of the Order purports to give BP the following options: (1) copy all of the e-mails onto CD ROMs and produce them to Plaintiffs without reviewing them; (2) in fifteen days, perform a full privilege review by hand of 200,000 documents at a cost of \$62,000, excluding attorneys' fees; or (3) in fifteen days, perform a cursory privilege review that will inevitably result in numerous privileged documents being produced. (A1219-1221). If BP followed any of the three choices, the court held that BP's right to claim documents were privileged would not be waived at trial. (Id.)

None of these options are viable. The first and third options would compel BP to waive its rights to review its documents and not to produce privileged documents to Plaintiffs. The second option is not feasible. BP could not possibly conduct a full review

of the 200,000 e-mails by hand in only 15 days.<sup>4</sup> None of these options can be upheld as a matter of law because they do not provide adequate protection of BP's documents that are protected by the attorney-client privilege.

When the Order is read in its entirety rather than focusing only on the "wherefore" clause, however, it is clear that the trial court intended for BP to produce the e-mails by "simply copy[ing] all of the e-mails in their original format onto CD ROM discs." (A1220). Finding that \$62,000 plus attorneys' fees should not be shifted to Plaintiffs because copying the e-mails onto CDs was a cheaper option, the trial court assumed BP would not be able to review the documents for privilege or that any limited review would be inadequate. This is why the trial court stated that BP's privilege would not be waived at trial. The trial court understood that it had taken away BP's ability to conduct an adequate review for privilege by denying its motion for cost shifting and ordering it to produce the e-mails in fifteen days.

This Court should also reject Plaintiffs' argument that the trial court did not order BP to produce privileged documents because BP should have been reviewing these e-mails for the past three years. (Respondent's Brief, p. 116). BP thought these e-mails

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<sup>4</sup> BP asked for at least seven months to conduct a review of the original production of more than 300,000 e-mails. (A518). BP requested fourteen days for review as alternative relief so that BP would at least have time to run a search to remove privileged e-mails concerning this particular lawsuit. BP never contemplated nor admitted that it could perform a full privilege review in only two weeks.

were irrelevant and, therefore, not discoverable. BP was not ordered to produce these e-mails until the October 12, 2004 Order, which it is now appealing. It would not have been reasonable for BP to have conducted a privilege review of these irrelevant and non-responsive e-mails before the October 12, 2004 Order. BP has challenged the Order and this Court has issued its preliminary writ. BP, therefore, has the right to wait until this Court decides whether the trial court's Orders are enforceable before BP reviews the e-mails for privilege.

**VI. EVEN IF SOME OF THE E-MAILS ARE RELEVANT, BP HAS NO DUTY TO PRODUCE THEM BECAUSE THE PLAINTIFFS' NEED FOR THE INFORMATION DOES NOT OUTWEIGH BP'S BURDEN OF PRODUCTION.**

Plaintiffs argue that the production of the e-mails is not burdensome because BP conducted its search in a manner that did not allow it to add new search terms, making the burden BP's fault. (Respondent's Brief, p. 99). As explained above, Plaintiffs misunderstand BP's ability to run new searches. The \$62,000 fee, excluding attorneys' fees, is not a fee that BP is incurring because of a need to run new searches. It is a fee for inserting every e-mail, regardless of whether it hit a search term or not, into the software review system so that BP can review them for privilege and organize them for production. Thus, it is not a fee that BP caused itself to incur by failing to consult with Plaintiffs. Plaintiffs' argument that any burden was created by BP cannot withstand scrutiny when one understands that the \$62,000 is caused by Plaintiffs' inflexible

position that BP must review every document by hand, not by any alleged failures in BP's search methodology.

Plaintiffs never claim that these e-mails contain information that they need to pursue their claims. (Respondent's Brief, pp. 100-104). The only instance in which Plaintiffs state that they do not have all of the information they need to pursue their claims is when they cite to alleged deficiencies regarding BP's production of transfer prices, additive and secondary transportation costs, credit card information and BP's marketing strategy. (Respondent's Brief, pp. 86-87). A comparison of those issues to the search terms used by BP shows that there is at least one corresponding search term for every one of those topics. (A748-752). Thus, Plaintiffs cannot claim that any alleged deficiency will be cured by production of the additional 200,000 e-mails because the e-mails have already been searched for those topics. In addition, BP has produced more than one million documents both in paper and CD format and more than 500,000 e-mails that contain the information Plaintiffs need to pursue their claims. Thus, contrary to MATA's argument, BP's production of the subset of 200,000 e-mails at issue will not "make or break" the case. (MATA brief, p. 7).

Plaintiffs' failure to explain that they need the e-mails at issue to pursue their claims demonstrates that the substantial burden to produce the e-mails cannot be justified.

## **VII. PRIVATE AND CONFIDENTIAL E-MAILS SHOULD BE PROTECTED FROM PRODUCTION.**

Plaintiffs and MATA fail to address BP's central privacy argument that there are numerous e-mails that contain private information that were sent between BP

management and BP employees or that otherwise contain private and confidential information about employees. These irrelevant and confidential e-mails should be protected from discovery.

These e-mails might include correspondence regarding medical issues, 401(k) plans and other employee benefits that were sent between BP management and a BP employee. They might also include employee reviews sent through BP's e-mail system. The e-mails BP is attempting to protect could include resumes of potential employees or current employees applying for higher positions within the company. These types of e-mails have replaced the more traditional hard copy personnel file that contain personal information that is entitled to protection from disclosure. Personnel files and any files that contain HIPAA-protected medical records and job performance reviews are protected from disclosure due to fundamental privacy rights. State ex rel. Tally v. Grimm, 722 S.W.2d 604, 605 (Mo. banc 1987); State ex rel. Brown v. Dickerson, 136 S.W.3d 539, 545 (Mo. Ct. App. 2004); State ex rel. MacDonald v. Franklin, 149 S.W.3d 595, 598 (Mo. Ct. App. 2004).

Plaintiffs complain that BP did not raise this issue with the trial court and has waived its arguments on this issue. (Respondent's Brief, p. 118). This issue, however, is an important matter of public policy that should be considered by this Court on appeal. Trial courts should not be allowed to order production of documents without first allowing the producing party's lawyers to review the documents for private and confidential e-mails. Thus, this Court should address this important policy issue. See Lipic v. Lipic, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003).

In addition, it makes no difference that the parties have a protective order in this case that would limit review of certain documents to Plaintiffs' counsel. Counsel has no more right to see these private and confidential documents than Plaintiffs themselves do. This Court has held that a protective order allowing counsel to see information that is private and not related to the issues in the petition is insufficient and "does not protect plaintiff from disclosure of information that may be irrelevant but embarrassing, or even harmful, to her adversaries who have a direct financial interest in misusing the information." State ex rel. Madlock v. O'Malley, 8 S.W.3d 890, 892 (Mo. banc 1999). A protective order stating that the documents will only be shown to certain people is not adequate protection. The documents should be protected from disclosure to anyone.<sup>5</sup>

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<sup>5</sup> BP did not seek a protective order to protect these privacy concerns because these documents were not relevant and thus not discoverable because this case involves a commercial dispute. See Sup. Ct. R. 56.01(b) (allowing discovery of only relevant and non-privileged documents). The current Stipulated Protective Order was negotiated on the assumption that all the documents produced would be relevant, and thus it was not necessary to obtain a protective order to preclude the production of irrelevant, privileged and private documents. If this Court concludes that a protective order is a better vehicle to prevent the production of non-relevant, privileged and confidential documents, BP will file a motion on remand to the trial court for a protective order against production of irrelevant, privileged and private e-mails.



**VIII. ALTERNATIVELY, IF THIS COURT DETERMINES THAT THE 200,000 E-MAILS MUST BE PRODUCED, THE COSTS OF THAT REVIEW SHOULD BE SHIFTED TO PLAINTIFFS.**

Plaintiffs' argument that the costs of BP's review of the 200,000 e-mails should not be shifted is premised on two points: (1) the expense was caused by BP and (2) the data is accessible. (Respondent's Brief, p. 105). BP has already explained that the \$62,000 cost, excluding attorneys' fees, is caused by Plaintiffs' insistence that every e-mail be reviewed by hand, not BP's allegedly inadequate search. Plaintiffs' second point, that the data is accessible, is also irrelevant. The cases Plaintiffs cite, as BP has already observed in its Opening Brief, do not limit a court's ability to shift costs for electronic data that is accessible. The judge who created the "accessible/inaccessible" distinction has confirmed BP's understanding, and the Proposed Federal Rules specifically state, that the balancing test in Rule 26 may continue to be applied against accessible data. (Opening Brief, p. 114, n. 15).

Plaintiffs have failed to demonstrate that the need for the information is proportionate to the burden imposed to retrieve the information. Ford v. Messina, 71 S.W.3d 602, 607 (Mo. 2002) (parties may seek relief from production if the burden and expense outweigh the need for discovery). BP has demonstrated that the 200,000 e-mails will not likely provide information that Plaintiffs need to pursue their claims and that it will impose an undue burden upon BP to produce the documents. Cost shifting, including costs of attorney review time, is therefore an appropriate protective measure to

ease the burden of production on BP, assuming this Court determines that the documents must be produced.

### **CONCLUSION**

For these reasons, and for those stated in BP's Petition for Writ of Prohibition or, in the Alternative, Petition for Writ of Mandamus, and in Relator's Opening Brief, BP requests that this Court make the preliminary writ absolute, prohibiting the trial court from enforcing its October 12, 2004, and February 25, 2005 Orders. This Court should hold that BP's search term methodology was reasonable and complied with Rule 56.01 and that Plaintiffs requested and the trial court ordered production of 200,000 additional e-mails that are irrelevant to the subject matter involved in the pending action under Rule 56.01(b)(1) and should not be produced or that such production is unduly burdensome.

Alternatively, if this Court determines that the 200,000 e-mails are potentially responsive, the preliminary writ should still be made permanent because the trial court's Orders violate BP's attorney-client privilege. If Plaintiffs choose to file a new request for these e-mails, the Court should hold that BP is entitled to a reasonable amount of time to review the e-mails for privilege, privacy, confidential matters and relevancy with the cost of the review, including BP's attorneys' review time, to be shifted to Plaintiffs.

BP further prays for such other relief as the Court deems just and proper.

November 18, 2005

Respectfully submitted,

OF COUNSEL:

GREENSFELDER, HEMKER  
& GALE, P.C.  
2000 Equitable Building  
10 South Broadway  
St. Louis, Missouri 63102  
(314) 241-9090  
(314) 345-5465 – Fax

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David M. Harris, # 32330  
dmh@greensfelder.com  
Dawn M. Johnson, # 41991  
dmj@greensfelder.com  
Jordan B. Cherrick, # 30995  
jbc@greensfelder.com  
Julia M. Sinn, # 55091  
jms@greensfelder.com

Attorneys for Defendant Amoco Oil Company,  
now known as BP Products North America Inc.

**CERTIFICATE OF VIRUS-FREE COMPUTER DISKETTE**  
**AND CERTIFYING WORD COUNT**

The undersigned certifies that a copy of the computer diskette containing the full text of Relator's Reply Brief is attached to the brief and has been scanned for viruses and is virus-free.

The undersigned also certifies that this Brief complies with the limitations contained in Rule 84.06(b), in that, excluding the cover page, Certificate of Service, this Certificate and the signature block, it contains 7,693 words, according to the word count tool of Microsoft Word.

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via hand delivery, on this 18th day of November, 2005, to:

Michael P. Gunn  
John R. Gunn  
The Gunn Law Firm, P.C.  
1714 Deer Tracks Trail #240  
St. Louis, MO 63131  
Attorneys for Plaintiffs

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via Federal Express, on this 18th day of November, 2005, to:

Joseph W. Letzer  
Mark M. Lawson  
Eric D. Franz  
David A. Bragdon  
Burr & Forman, LLP  
South Trust Tower  
420 North Twentieth Street, Suite 3100  
Birmingham, Alabama 35203  
Attorneys for Plaintiffs

James B. Gunther, Jr.  
Gunther Law LLC  
3415 Highway 53  
Huntsville, Alabama 35806  
Attorneys for Plaintiffs

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via hand delivery, on this 18th day of November, 2005, to:

The Honorable John R. Riley  
Circuit Court of St. Louis City  
22<sup>nd</sup> Judicial Circuit  
Civil Courts Building  
10 N. Tucker Boulevard  
St. Louis, MO 63101  
Respondent

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via federal express, on this 18th day of November, 2005, to:

Madeleine M. McDonough  
Arlen L. Tanner  
Julie A. Shull  
Shook Hardy & Bacon LLP  
2555 Grand Boulevard  
Kansas City, MO 64108  
Attorneys for Amicus Curiae Product Liability Advisory Council

Hugh F. Young, Jr.  
Product Liability Advisory Counsel, Inc.  
1850 Centennial Drive, Suite 510  
Reston, VA 20191  
Attorneys for Amicus Curiae Product Liability Advisory Council

Leland F. Dempsey  
Dempsey & Kingsland, P.C.  
1100 Main Street, Suite 1860  
Kansas City, MO 64105  
Attorney for Amicus Curiae Missouri Association of Trial Attorneys

840135v6

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